No. 21080

United States
COURT OF APPEALS
for the Ninth Circuit

PACIFIC INLAND NAVIGATION COMPANY, a corporation,

Appellant Cross-Appellee,

v.

DELBERT A. COURSE,

Appellee Cross-Appellant.

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

BRIEF OF AMICUS CURIAE
COLUMBIA RIVER TOWBOAT ASSOCIATION

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BRIEF OF AMICUS CURIAE COLUMBIA RIVER TOWBOAT ASSOCIATION

With consent of the parties and pursuant to Rule 18(9) of this Court the Columbia River Towboat Association presents this brief as amicus curiae. It is directed to the single question of whether or not Section 5 of the Longshoremen's & Harbor Workers' Compensation Act, C509, #5, 44 Stat. 1426, 33 U.S.C. #905, precludes

appellee, Delbert Course, a harbor worker, from maintaining his libel *in personam* against his employer, the appellant, Pacific Inland Navigation Co. for damages arising from personal injuries which he sustained while working aboard his employer's tug, BANNOCK. The pertinent portion of Section 5 of the Act reads:

> "The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, . . . otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ."

While the above language in Section 5 of the Longshoremen's Act clearly bars the *in personam* action of Delbert Course against his employer the Supreme Court by broad language rather than its holding in *Reed* v. *Yaka* (1963), 373 U.S. 410, so muddied the waters as to persuade the district court below that it was required to ignore or consider repealed the unequivocal language of Section 5. In this case a pre-trial motion to dismiss was denied. Upon trial, Delbert Course recovered judgment resulting in appeal by his employer and our appearance as amicus curiae.

Unless reversed the judgment of the District Court will have a harsh and incongruous effect upon the tug boat industry.

The Columbia River Towboat Association is comprised of fourteen tugboat operators, including Pacific Inland Navigation Co., who have been for many years engaged in towing and transporting cargoes on the Co-

lumbia and Willamette Rivers.[1] Each operator, whether large or small, employ shop repairmen, welders, and marine electricians precisely, as did Pacific Inland Navigation Co. employ Delbert Course. These employees are employed regularly on a year around basis. They work primarily ashore but as occasion requires they board their employer's vessels to repair, maintain or overhaul them. None are members of a crew and none do longshoremen's work or are employed through a hiring hall for specific jobs as are longshoremen. These tugboat operators, as employers, for years have carried insurance pursuant to the Longshoremen's Act to cover these employees when working spasmodically, at best, on navigable waters.

Before presenting our analysis of the *Yaka* case, we believe the pointing out of the harsh and incongruous results that will beset the tugboat industry if Delbert Course is permitted to recover in this case, can best demonstrate why the Supreme Court could never have intended to establish a precedent for a direct action as is here involved.

We agree with Mr. Justice Harlan in his dissent in *Yaka* that the following statement by Mr. Justice Black in his dissent in *Ryan Stevedoring Co.* v. *Pan-Atlantic*

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[1] *Atlas Tug Service,* Longview, Washington; *Brusco Towboat Co.,* Cathlamet, Washington; *Columbia Pacific Towing Corporation,* Stevenson, Washington; *Diesel Towing Co.,* Portland, Oregon; *Knappton Towboat Co.,* Portland, Oregon; *The Mirene Co.,* Portland, Oregon; *Pacific Inland Navigation Co.,* Vancouver, Washington; *Ramona Towboat Co., Inc.,* Portland, Oregon; *Shaver Transportation Co.,* Portland, Oregon; *Shepard Towing Co.,* St. Helens, Oregon; *Smith Tug & Barge Co.,* Rainier, Oregon; *Tidewater Barge Lines, Inc.,* Portland, Oregon; *Western Transportation Co.,* Portland, Oregon; and *Willamette Tug & Barge Co.,* Portland, Oregon.

SS Corp (1956), 350 U.S. 124 states as concisely and as accurately as any the statutory design of the Longshoremen's Act:

> "Congress weighed the conflicting interests of employers and employees and struck what was considered to be a fair and constitutional balance. Injured employees thereby lost their chance to get large tort verdicts against their employers, but gained the right to get a sure, though frequently a more modest, recovery. However, Sec. 33 did leave employees a chance to recover extra tort damages from third persons who negligently injured them. And while Congress imposed absolute liability on employers, they were also accorded counterbalancing advantages. They were no longer to be subjected to the hazards of large tort verdicts. Under no circumstances were they to be held liable to their own employees for more than the compensation clearly fixed in the Act. Thus employers were given every reason to believe they could buy their insurance and make other business arrangements on the basis of the limited Compensation Act liability."

From the act as epitomized by Mr. Justice Black it appears that it was designed to give the harbor worker at best, one bite out of two apples; not two bites out of the same apple. He could for certain get a small bite from the apple of his employer, and then if the situation permitted, try for a larger bite from an apple of a third person. Here, Delbert Course has already taken two bites from his employer's apple. It cannot be done if plain language of Congress means anything.

If Delbert Course, after receiving full benefits under

the act, can collect a further $12,588.08 from his employer then the primary benefit of the Longshoremen's Act for the employer has gone out the window. It is no answer to say that by some theory of set-off the employer can deduct compensation paid under the act from the larger judgment because the *quid pro quo* for the employer in the first instance to provide compensation upon a no fault basis has been taken away.

This Court has long held that the Longshoremen's Act is to be interpreted so as not to be unfair to either the employee or employer. *Pacific S. S. Co.* v. *Pillsbury* (D. Ct., Calif., 1931), 52 F.2d 686 affirmed in (9 Cir. 1932) 56 F.2d 79. What could be more unfair than to require the employer to subsidize his employee by paying benefits in order to enable him to later sue for more money than the Act requires to be paid to the employee? Yet, the cruelest thing of all is that the tugboat-employer cannot abandon the Act and take his chances in a court of law or admiralty as before the Act. Section 5 provides that should the employer give up paying insurance premiums to "secure payment of compensation" to his employee, then his employee can elect to either claim under the Act or sue him in any court of law or in admiralty where all of the employer's traditional defenses, such as contributory negligence, are taken away from him. While the employee may elect the employer cannot. This might not be so bad, except the employer still cannot get out of the Act's clutches, as by Section 38 (33 U.S.C. #938) failure to secure payment of compensation subjects the employer to a $1,000 fine and one year in jail.

Atop of this, Section 44 (33 U.S.C. #944) requires the employer in certain cases to contribute to a trust fund for benefit of certain employees in general.

In short, if Delbert Course can sue his employer in law or in admiralty to recover damages either arising from causative negligence or causative unseaworthiness of his employer's vessel, then the once equitable Act has been transformed into a snare and a delusion for the employer—in this case the tugboat industry. If Section 5 of the Longshoremen's Act is to be emasculated by the judiciary, it could very well lead to a repeal or wholesale disregard of the Act. This would be a blow to the harbor worker, who at one time so much wanted a compensation act for industrial injuries, just as was furnished to his shore-based brethren by the various states.

Reed v. Yaka is clearly a third party case giving no real support for libel in personam by a harbor worker against his employer-tugboat owner.

The Supreme Court has consistently reminded both bench and bar that:

> ". . . general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." *Osaka Shosen Line* v. *United States* (1937), 300 U.S. 98, 102; *Humphrey's Executor* v. *United States* (1935), 295 U.S. 602, 626.

With this as a criteria let us examine *Yaka* to determine

if its holding really supports Delbert Course in his direct *in personam* libel against his employer-tugboat owner.

To begin with, *Yaka* was pleaded and tried throughout three courts as: (1) a direct libel *in rem* by longshoreman Reed against the vessel YAKA, which was owned and claimed by Waterman Steamship Co.; and (2) a libel *in personam* by Waterman S.S. Co. against Pan-Atlantic S.S. Co., the bare-boat charterer of the YAKA, for breach of the latter's agreement contained in the bareboat charter to indemnify and save Waterman harmless from claims such as was being asserted by longshoreman Reed. At no time did Reed assert a direct claim of any kind against his employer, Pan-Atlantic. The case in every respect was typical of those sanctioned by the Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Co.*, (1956) 350 U. S. 124, except for the fact that in *Yaka* the stevedore happened also to be the operator of the YAKA as a bare-boat charterer which placed him in the status of owner *pro hac vice*. The framework of this litigation is ascertained by reading the District Court's opinion (183 F. Supp. 69), the Court of Appeals opinion (307 F.2d 203) as well as the Supreme Court's opinion (373 U. S. 410).

What happened in *Yaka* is that after the Court had granted certiorari to consider the question of whether or not an underlying personal liability was essential to support a libel *in rem* against a vessel, the Court determined to avoid that question as it saw under the facts a personal liability. The Court found two owners of the YAKA; Waterman as the true owner, who would be re-

quired to respond to Reed's libel *in rem,* lest its vessel be sold, and Pan-Atlantic as a second owner by operation of law, i.e. a bareboat charterer with the status of owner *pro hac vice.* For its theoretical purpose of furnishing a personal liability to support Reed's *in rem* claim it did not matter to the Court from whence it came. Since it was Waterman which really owned the vessel and would be required to respond to Reed's *in rem* libel, one would think if the *in rem* action was to be supported at all, it would have to be by Waterman's personal liability. However, Waterman had no personal liability as at time of Reed's injury the vessel was in control of Pan-Atlantic. To avoid this "sticky wicket" the Court, for its limited purposes, saw no reason why it could not use Pan-Atlantic's personal liability to underlay and support Reed's claim *in rem* against the vessel belonging to Waterman. This is exactly what it did.

As to Pan-Atlantic, this case was routine. It was only Waterman and not Reed who made claim against Pan-Atlantic in a libel *in personam* for breach of a maritime contract to indemnify. The Court had held in *Ryan* that Section 5 of the Longshoremen's Act was no procedural bar to such a right-over, inasmuch as the party asserting the right-over was not the longshoreman himself. Absent a direct action against Pan-Atlantic by Reed, Section 5 of the Longshoremen's Act would not come into play and absent Section 5 there could be little doubt but what a bareboat charterer as owner *pro hac vice* would be liable to maintain a seaworthy ship for its seamen.

Holding in Yaka

Within the factual posture of this case it was relatively simple for the Court, without much explanation and without over-ruling prior decisions or voiding an Act of Congress, to hold in the very last sentence of its opinion written by Mr. Justice Black:

> "We conclude that petitioner was not barred by the Longshoremen's Act from relying on Pan-Atlantic's liability as a shipowner for the *Yaka's* unseaworthiness in order to support his libel *in rem* against the vessel."

As we see it, the above quoted last sentence is the only holding which the Court made, the only holding favorable to Reed which it could have made and a holding which cannot in any manner support Delbert Course in his *in personam* libel against his employer, who also happened to be the true owner of tug *BANNOCK*.

Our view of the limited holding in *Yaka* is precisely the view of the Court in *Robinson* v. *Lykes Bros. S. S. Co.* (Ct. App. La., 4 Cir., 1965) 170 So. 2d 243 where in a case the same as we have at bar, the Court rejected *Yaka* as sanctioning an *in personam* suit by a longshoreman against his employer-shipowner. After quoting the last sentence in the *Yaka* opinion as its holding (as above) the Court observed:

> "The Court was not called upon, and did not hold that an 'in personam' action could be brought by an injured longshoreman against his employer who was also the shipowner."

We concede there are broad statements in the Court's opinion speaking generally of situations beyond the facts of *Yaka,* which no doubt influenced the able trial judge to conclude that the Supreme Court was nullifying Section 5 of the Longshoremen's Act as a procedural bar to an employee such as Delbert Course to maintaining a direct libel in admiralty and *in personam* for damages arising from being injured while working aboard his employer's tugboat. Typical is the following language of the Court appearing directly above its limited holding:

> ". . . Pan-Atlantic relies simply on the literal wording of the statute, and it must be admitted that the statute on its face lends supports to Pan-Atlantic's construction. But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area, like *Sieracki, Ryan,* and others, the holdings of which have been left unchanged by Congress.
>
> ". . . And *Ryan's* holding that a negligent stevedoring company must indemnify a shipowner has in later cases been followed and to some degree extended. In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid. We have previously said that the Longshoremen's Act 'must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous

> results.' We think it would produce harsh and incongruous results, one out of keeping with the dominent intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company. . ."

The Court's opinion, including the above quoted language, brought a seething dissent by Mr. Justice Harlan joined in by Mr. Justice Stewart, which in effect accused the Court of exceeding its jurisdiction by judicially repealing a plain and valid act of Congress. The broad language of the Court gives some basis to the charge of the dissenters; however, the holding of the Court does not. We prefer to argue to this Court that the holding in *Yaka* is in keeping with *Ryan* and Section 5 of the Longshoremen's Act and is not, as the dissenters say, — a "holding that a longshoreman may recover from his own employer for injuries suffered in the course of employment" and that the Court "has effectively 'repealed' a basic aspect of the Longshoremen's and Harbor Workers' Compensation Act."

To us, it is inconceivable that the Court would intentionally ignore or trod upon valid Congressional action. To our way of thinking such would be tantamount to treason to a government so firmly fixed as one of law and not of men. Our view of *Yaka* as here ex-

pressed squares completely with *Ryan, Sieracki* and other decisions of the Supreme Court, none of which have judicially repealed Section 5 of the Longshoremen's Act.

The Ryan Case

In *Ryan* the Court fashioned a new concept of a right-over for the shipowner against the stevedore and in doing so walked a tight rope. On one side of the tight rope was *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.* (1952) 342 U.S. 282 wherein the Court refused to solve the "maritime triangle" by violating the common law rule against contribution by co-tort-feasors. On the other side was Section 5 of the Longshoremen's Act which prohibited the longshoreman from suing his employer at law or *in admiralty*. Affirming the validity and its clear understanding of Section 5 of the Longshoremen's Act, but going around it by fashioning a right-over in contract (express or implied-in-fact) the Supreme Court in *Ryan* held:

> "While the Compensation Act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo properly. (citing authorities)."

It would seem to us that the Court in *Yaka* also endeavored to walk a tight rope just as it did in *Ryan*. It did not strike down Section 5 but avoided it as it had

already been construed in *Ryan* as strictly a procedural bar to direct actions such as Delbert Course has pursued in the case at bar. This did not, however, frustrate the Court in furnishing an underlying personal liability to support Reed's *in rem* action against Waterman any more than taking a personal liability of Pan-Atlantic to maintain a seaworthy ship to support the Waterman liability. There is no contradiction in saying that while Pan-Atlantic owed a duty to furnish a seaworthy ship to "seaman" Reed he could not sue Pan-Atlantic directly for breach of such duty. After all, the duty was owed to all seamen. Reed happened to be a shore-based "super-seaman" in the sense that unlike the sea-going seaman he had the benefits of compensation under the Longshoremen's Act in lieu of a direct cause of action at law or in admiralty against his employer. Just because Reed in *Yaka* was successful in his indirect approach by suing *in rem* a vessel owned by a third party, Waterman did not mean he could have sued his employer, Pan-Atlantic should it have happened (which it did not) that Pan-Atlantic owned the vessel. The finding of an underlying duty that can be availed of by some and not others is not an uncommon principle of law. One of many examples is found in *Kesler* v. *Department of Public Safety* (1962) 369 U.S. 153, 170 where the Supreme Court held that while a discharge in bankruptcy prevented a judgment creditor from collecting a judgment from a debtor it did not extinguish or remove all traces of the debt from the debtor so as to prohibit the State of Utah under a safety statute from insisting that the discharged debt be satisfied before

the debtor's driver's license be re-instated. Considering Mr. Justice Black's dissent in *Ryan* and his concise exposition of the Longshoremen's Act therein, it is difficult for us to believe that when he spoke for the Court in *Yaka,* he intended any more than making the limited holding as set forth in the last sentence of the Court's opinion.

The Sieracki Case

As for *Seas Shipping Co.* v. *Sieracki* (1946) 328 U.S. 85, the Court held that a longshoreman was entitled to be assured of a seaworthy ship even though, like true seamen, the longshoreman was not employed by the shipowner. Even in that early case, the Court recognized that Section 5 of the Longshoremen's Act (33 U.S.C. #905) would bar a direct action should the shipowner also be the longshoreman's employer. Mr. Justice Rutledge, speaking for the Court at page 102 stated:

> "We may take it therefore that Congress intended the remedy of compensation to be exclusive as against the employer. See *Swanson* v. *Marra Brothers, Inc.,* ante p. 1); 33 U.S.C. #905. But we cannot assume, in face of the Act's explicit provision, that it intended this remedy to nullify or affect others against third persons. Exactly the opposite is true. *The legislation therefore did not nullify any rights of the longshoremen against the owner of the ship, except possibly in instance, presumably rare, where he may be hired by the owner. The statute had no purpose or effect to alter the stevedore's rights as against any but his employer alone.*" (emphasis added)

The Swanson Case

And, of course, in *Swanson* v. *Marra Bros.* (1946) 328 U.S. 1, the longshoreman was denied a direct action against his employer-shipowner. The case turned on more than the fact that the longshoreman was not a member of a crew. Mr. Justice Black announced the opinion of the Court by Mr. Chief Justice Stone. At page 6 he stated:

> ". . . The liability of employers to pay the prescribed compensation is, by #905, made 'exclusive and in place of all other liability of such employer to the employee' his legal representative and any other person entitled to recover damages 'at law or in admiralty' from the employer for the injury or death. . . ."

The O'Rourke Case

Ten years after *Swanson* v. *Marra Bros.,* supra, came another fundamental decision of the Supreme Court in *Pennsylvania Railroad Co.* v. *O'Rourke* (1953) 344 U.S. 334. There a railroad employee was injured while releasing a hand brake on a freight car while he was in the process of unloading the freight car from a carfloat owned and operated by his employer. He sued his employer as authorized by F.E.L.A. The Pennsylvania Railroad defended by asserting that the railroad employee was injured while afloat on navigable waters and hence was a harbor worker and that because of Section 5 of the Longshoremen's Act he was barred from suing his float owner-employer. The Court agreed with the railroad and dismissed the suit. In doing so it stated:

". . . The exclusive coverage of Nos. 903, 905 extends to an employee of an employer, made liable by No. 904, when he is injured, in the course of his employment, on navigable water. The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act."

In view of the *Ryan, Sieracki, Swanson* and *O'-Rourke cases, supra,* it should be evident that when the Supreme Court in *Yaka* stated:

". . . But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area, like *Sieracki, Ryan,* and others, the holdings of which have been left unchanged by Congress."

the Supreme Court had reference only to not permitting any "paycheck arrangements" had with a longshoreman to frustrate the third party and right-over system with which it was confronted in *Yaka,* and which it had fashioned in *Ryan.* The Supreme Court did not say in *Yaka* that a longshoreman could sue his employer *in personam* for causative unseaworthiness or causative negligence in spite of Section 5 of the Longshoremen's Act, if his employer (as in *O'Rourke* and *Swanson*) happened also to own the vessel upon which he was injured.

Congressional Action and Non-Action

Further support for this view of the language in *Yaka* is found in the language itself. As stated by the

Court, its interpretation was influenced by lack of Congressional reaction to the Court's decisions such as *Sieracki* and *Ryan*. There has been no Congressional reaction to change or modify the shipowner's right-over as fashioned in *Ryan*. However, in 1959 Section 33 of the Longshoremen's Act (33 U.S.C. #933) was amended to give the longshoreman better control of his third party claim so as to cure the reason for the fear which Mr. Justice Black had expressed in his dissent in *Ryan*. Of significance here is that at that time Congress in Section 33(a) not only clarified the third party action for the longshoreman but expanded the immunity of the employer from direct action to include person or persons in the employers employ. It also added a new sub-section "(i)" reading:

> "(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ. *Provided,* that this provision shall not affect the liability of a person other than an officer or employee of the employer." (As amended August 18, 1959, Pu. L. 86-171, 73 Stat. 391, 33 USC #933).

The unmistakable purpose of the new language in Section 33 was to immunize the "employee family" of the employer from damage suits brought by longshoremen at law or in admiralty by placing fellow employees of the injured longshoreman under the umbrella of the Longshoremen's Act along with the employer who had earlier been so immunized by Section 5 of the Act. In-

stead of impliedly permitting a longshoreman to sue *in rem* as a "third party" his employer's vessel it in effect broadened the immunization of Section 5 by insulating not only the employer but also fellow employees of the injured party from liability in damages to the injured party. *Bynum* v. *MORMACTEAL* (E.D. Pa., 1960) 188 F. Supp. 763; *Garland* v. *Alaska Steamship Co.* (D. Ct. Alaska, 1963) 217 F. Supp. 757. *Report of Secretary of Labor to the Senate on H.R.* 451, U. S. Code, Congressional and Administrative News, 1959 at page 2134.

In the summer of 1959 when H.R. 451 which amended Section 33 of the Longshoremen's Act became law, the Supreme Court had decided *Sieracki* (1946), *Ryan* (1956), *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.* (1958), 355 U.S. 563 and was in the process of deciding *Crumady* v. *The Joachim Hendrick Fisser*, (1959), 358 U.S. 423. These cases all had to do with the fashioning of the shipowner's right-over against the stevedore and not any direct action by longshoremen against his employer or his vessel. So, when the Supreme Court in *Yaka* viewed Section 5 in the light of its prior cases — "*Sieracki, Ryan,* and others" it must have been referring to the above cases. And when it stated that its holdings have been left unchanged by Congress it must again have been refering to its holdings in the above cases as Congress had taken positive action in 1959 to amend Section 33 so as to broaden the insulating effect of Section 5. As a consequence we think it is sound for this Court to read and understand the language in *Yaka* in the light of the "right-over" phase of

the "maritime triangle" as was factually before the Supreme Court in *Yaka* and ignore, as unsound, any connotation that might suggest that the Supreme Court intended to sanction direct *in personam* action by employee against employer upon the excuse that the employer happened also to be the owner of the vessel upon which the injury occurred.

Furthermore, if the Court in *Yaka* had at all intended by its language to sanction direct action by a longshoreman against his shipowner-employer, it would have been required to strike down the holding in *Smith v. The MORMACDALE* (3 Cir., 1952), 198 F.2d 849, as that case was cited and relied upon in both the District Court and the Court of Appeals. It did not. In fact, in the Circuit Court of Appeals, when Judge Staley joined the dissent of Chief Judge Biggs to the Court's holding which was reversed by the Supreme Court, he noted:

> "I join Chief Judge Biggs in his conclusion in his dissent. I read his dissent as not disturbing *Smith* v. *Mormacdale,* 198 F2d 849 (C.A. 3, 1952) where the employer was also the shipowner."

It should be mentioned that *Smith* v. *MORMACDALE,* supra, relied heavily upon the reasoning in *Samuels* v. *Munson S.S. Line* (5 Cir., 1953), 63 F.2d 861. Both of these cases are precisely like the one at bar where Delbert Course has sued his employer-tugboat owner, except that they were *in rem* while his is *in personam.* Both of these cases would deny Delbert Course the remedy he here has sought.

This Court should follow the limited holding in Yaka and not its language in order to uphold a plain act of Congress and not accuse the Supreme Court of going beyond its jurisdiction.

We are aware that other district courts, i.e. *Herte* v. *American Export Lines, Inc.* (S.D. N.Y., 1964), 225 F. Supp. 703 and, of recent, the Court of Appeals for the Fourth Circuit in *Biggs* v. *Norfolk Dredging Co.* (4th Cir., 1966), 360 F.2d 360 have held that Section 5 of the Longshoremen's Act is no bar to an action such as that brought by Delbert Course. It has, we think come about by those courts refusing to cut with surgical precision into *Yaka* and discover what it actually held. For example, the Fourth Circuit Court of Appeals in *Biggs* v. *Norfolk Dredging Co., supra,* never really understood what was precisely before the Supreme Court in *Yaka* as it erroneously observed of *Yaka*: "His employer, the ship's bareboat charterer—or her owner *pro hac vice*—intervened to defend the suit." We commend to this Court the opinion of the Fourth Circuit Court of Appeals for the State of Louisiana in *Robinson* v. *Lykes Bros. S.S. Co.* (1965), 170 So. 2d 243, as being more sound than the opinion of the Fourth Circuit of the U. S. Court of Appeals just mentioned.

Trying to look as objectively as possible at the problem which confronts this Court in this case, we see it stemming from the broad language in *Yaka* which goes beyond its actual holding. The broad language gives some support to the District Court while the holding does not. For this Court in this *in personam* case to

permit Delbert Course to sue his employer-tugboat owner it will have to conclude: (1) That the plain language of Congress does not forbid it; and (2) That, as claimed by the dissenters in *Yaka,* the Supreme Court ignored or repealed an Act of Congress and in order to do so not only exceeded its jurisdiction and the facts of the case but also impliedly reversed many of its prior and important decisions.

Confronted with a duty to follow holdings of the Supreme Court, as well as valid Congressional action, we urge that this Court be mindful of the principle mentioned in *Osaka Shosen Line* v. *United States* (1937), 300 U.S. 98 at 102 as previously mentioned and bear heed to the observation of the Court of Appeals for the Fourth Circuit in *Carey* v. *Foster* (4th Cir., 1965), 345 F.2d 772.

In this last cited case the Court was confronted with deciding whether a wife had an action at law for damages for loss of her husband's consortium. The Court was confronted by a most vexing statute of Virginia. It observed in respect to its own jurisdiction at page 777:

> "The Virginia statute, however it is read, has placed an insurmountable obstacle in the way of judicial accomplishment of a result judges might think best. Courts may overturn judicially fashioned rules. They may withdraw or modify rights they once thought deserving of recognition, and they may recognize new rights when such recognition seems necessary to achieve a harmonious result, justice and equality. *They may not reverse a legislative exercise of constitutional power,* and

> rarely can they erect a structure to match a legislative creature though they may think the legislature should have gone further than it did." (emphasis added)

Certainly, in the case at bar the plain language o: Section 5 of the Longshoremen's Act forbids Delber Course to sue his employer-tugboat-owner. Both deci sions prior and subsequent to *Yaka* forbid it. When th Supreme Court speaks of interpreting the Longshoremen's Act so as to prevent harsh and incongruous re sults it must have considered those results as they appl to the employer-tugboat owner as well as to the employ ee. From such point of view equal protection of law an elementary fairness also forbids it. Until the Suprem Court speaks otherwise within the framework of a cas where it is required to make a holding, we submit tha this Court should reverse the District Court on the ba sis that Section 5 of the Longshoremen's Act prevent appellee from suing *in personam* his employer-tugboa owner.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of his brief, I have examined Rules 18 and 19 of the Jnited States Court of Appeals for the Ninth Circuit, nd that, in my opinion, the foregong brief is in full ompliance with those Rules.

WILLIAM F. WHITE